UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, ET AL.,

Appellants,

vs.

RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, et al.,

Appellees

Nos. [illegible]

An Appeal from the United States District Court, for the Southern District of California, Southern Division

BRIEF OF CHARGING PARTIES - APPELLEES

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BRIEF OF CHARGING PARTIES - APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an order and supplemental order of the United States District Court for the Northern District of California entered in proceedings which were instituted on behalf of the National Labor Relations Board against Appellants pursuant to Section 10(1) of the National Labor Relations Act (29 U.S.C. § 160 (1)). Appellee Ralph E. Kennedy, Regional Director of Region 21 of the Board, petitioned the District Court seeking a preliminary injunction interlocutory to the final disposition of charges filed with the Board by the Los Angeles Herald-

Examiner and the San Francisco Examiner ("Charging Parties") alleging that Appellants had engaged in, and were engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act (29 U.S.C. § 158(b)(4)(i)(ii)(B). The order and supplemental order by the court below, granting the preliminary injunction, were entered on February 7 and February 8, 1968, pursuant to findings of fact and conclusions of law made and filed on February 7, 1968. This court's jurisdiction, on appeal from those orders, is invoked under Sections 1291 and 1292 of Title 28 of the United States Code.

Subsequent to the filing of Notice of Appeal by Appellants, the Charging Parties moved to intervene as Appellees, and permission for the same was granted by this Court on April 19, 1968. This Brief is accordingly filed on behalf of Charging Parties - Appellees.

STATEMENT OF THE CASE

The Los Angeles Herald-Examiner (herein called the "Herald-Examiner") publishes a daily and Sunday newspaper in Los Angeles, California. It is an independent division of The Hearst Corporation. The San Francisco Examiner (herein called the "Examiner"), publishes a daily newspaper in San Francisco, California, and also publishes a Sunday newspaper jointly with the Chronicle Publishing Company. The Chronicle Publishing Company (herein called

"Chronicle"), a Nevada corporation, publishes a daily newspaper in San Francisco known as The Chronicle. The San Francisco Newspaper Printing Company (herein called "Printing Company"), a Nevada corporation, is located in San Francisco and is engaged in the business of newspaper printing. It performs the mechanical, circulation, advertising, accounting, credit and collection functions for both the Examiner and the Chronicle.

On or about December 15, 1967, the Appellant labor organizations, with the exception of the San Francisco-Oakland Newspaper Guild, commenced picketing the plant and premises of the Los Angeles Herald-Examiner in support of a labor dispute with that newspaper. Subsequently, on or about January 5, 1968, and for the purpose of supporting the labor dispute with the Herald-Examiner, Appellants commenced picketing the San Francisco plants and premises of the Examiner, the Chronicle and the Printing Company and distributing hand bills to employees and the public at those locations. Appellant San Francisco-Oakland Newspaper Guild orally instructed its members employed by the Printing Company to engage in work stoppages and refusals to perform services for their employer. As a result of these acts, the newspaper publication and printing facilities of the Examiner, the Chronicle and the Printing Company were shut down.

On January 5, and January 6, 1968 the Examiner and the Herald-Examiner filed charges and amended charges with the National Labor Relations Board, and filed additional charges on January 10, all alleging that Appellants had engaged in and were engaging in unfair labor practices prohibited by Section 8(b)(4)(i)(ii)(B) of the Act, which proscribes conduct in the nature of a secondary boycott.

After conducting a preliminary investigation, as required by Section 10(l) of the Act, Regional Director Kennedy concluded that there was reasonable cause to believe that Appellants had engaged in unfair labor practices under Section 8(b)(4)(i)(ii)(B) and that an unfair-labor-practice complaint should issue.* Thereupon, pursuant to Section 10(l) of the Act, Kennedy filed a petition in the Court below on behalf of the Board seeking a preliminary injunction pending final disposition of the proceedings before the Board. The petition for a preliminary injunction was supported by twenty affidavits, together with exhibits.

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On January 19, 1968 the complaint issued against Appellants based upon the charges filed by the Herald-Examiner and the Examiner, and is presently set for trial before a Trial Examiner of the Board commencing on May 20, 1968.

On January 12, 1968 the Court below issued an order requiring Appellants to show cause why an injunction should not issue enjoining and restraining them as prayed in the petition. That order provided that all evidence was to be presented by affidavits and that no oral testimony would be heard unless otherwise ordered by the Court.

On January 24, 1968 certain of the Appellants filed with the Court below a request for an order permitting depositions and/or interrogatories and/or compelling the attendance of eight named witnesses. On January 31, 1968 the District Court, after hearing arguments on the aforesaid request, denied the request. In rejecting this and a further request of Appellants for a continuance of the hearing to enable discovery, the Court concluded that to permit discovery by depositions or otherwise would at best create only conflicts in the evidence and raise credibility issues which would have to be resolved by the Board and which would not overcome the showing of reasonable cause that was clearly set forth in the petition and affidavits filed by Regional Director Kennedy.

On February 7, 1968, the District Court conducted a hearing on the petition, and after oral argument and consideration of the evidence, concluded that an injunction should issue. The Court entered findings of fact and conclusions of law on the same date, finding and concluding that there was, and that petitioner had, reasonable cause

to believe that the Herald-Examiner is operated independently of the Examiner, of the Chronicle, and of the Printing Company; that there was, and that petitioner had, reasonable cause to believe that appellants' picketing, and other conduct, at the San Francisco plants and premises of the Examiner, the Chronicle and the Printing Company, in furtherance of the dispute with the Herald-Examiner in Los Angeles, had an unlawful object and violated Section 8(b)(4)(i)(ii)(B) of the Act.

QUESTIONS PRESENTED

1. Whether it was clearly erroneous for the District Court to find and conclude that there is reasonable cause to believe that the Los Angeles Herald-Examiner is operated autonomously and independently of the San Francisco Examiner, the Chronicle, and the Printing Company, and that there is reasonable cause to believe that Appellants violated Section 8(b)(4)(i)(ii)(B) of the Act.

2. Whether it was clearly erroneous for the District Court to deny the request of Appellants for an order permitting depositions and/or interrogatories and/or compelling the attendance of witnesses.

3. Whether it was clearly erroneous for the District Court to enter a show-cause order requiring that all evidence be presented by affidavits, unless otherwise ordered by the Court.

SUMMARY OF ARGUMENT

As a subject for preliminary consideration, this brief first discusses the confined nature of the District Court's role in a Section 10(l) proceeding and the limited scope of review on an appeal from such proceeding. It is shown that the District Court in a Section 10(l) proceeding is merely required to determine whether there is reasonable cause to believe that an unfair labor practice enumerated in that section has been committed, and that this requirement is satisfied by the establishment of the elements of a prima facie case. The statutory standard of "reasonable cause" is met upon a showing by the Regional Director that the factual contentions and legal propositions underlying his petition are substantial and not frivolous. Thus, the question on appeal is not, as Appellants have asserted, whether the District Court erred in finding that the newspaper divisions of The Hearst Corporation are genuinely neutral employers and that there is reasonable cause to believe Appellants had violated the Act. The question before this Court is whether it was clearly erroneous for the District Court to find that there is reasonable cause to believe that the Herald-Examiner is operated autonomously and independently of the Examiner, the Chronicle and the Printing Company, and that there is reasonable cause to believe that Appellants have violated Section 8(b)(4)(i)(ii)(B) of the Act.

Discussion then turns to the authorities which demonstrate that the legal proposition underlying the Regional Director's petition herein is not frivolous and that it presents a substantial issue of law for determination by the National Labor Relations Board. In this connection it is shown that the Board and the courts have adopted a rule that commonly owned enterprises are not to be considered a single employer within the meaning of Section 8(b)(4) of the Act, unless there is such active common control over them, as distinguished from merely a potential common control, as to denote an appreciable integration of operations and management policies. In response to Appellants' argument that the courts and the Board have never applied this rule to separate divisions of a single corporation, it is pointed out that this question has only been before the Board one time and that in that instance, rather than adopting a rule of law precluding separate divisions of a single corporation from being considered separate employers, the Board predicated its decision on a finding that the separate divisions there involved were in fact commonly controlled and operationally integrated. Appellants' argument that the "common control" test is only applicable in situations involving separate legal entities rests upon a fallacious premise that the courts and the Board will look through form to substance when multiple forms are involved, but will disregard

substance when only one legal form is involved.

Next, the brief examines the evidence which supports the District Court's findings that there is reasonable cause to believe that the Herald-Examiner is in fact operated as an autonomous and independent division of The Hearst Corporation. In this connection, it is pointed out that Hearst is a conglomerate corporation consisting of many separate divisions, including newspaper publishing enterprises in seven different cities, a magazine division which publishes twelve magazines, three radio and television divisions operating in three separate cities, a newspaper feature syndicate, two real estate divisions operating in New York City and San Francisco, an international art and antiques division, a land and livestock division which manages western ranch properties and timberlands, a newspaper supplies division, and a specialty paper division which operates in Maine. The individual newspaper divisions are each managed and operated autonomously and independently of the others. Each newspaper is operated under the complete control of its own publisher assisted by his own separate executive staff. Each publisher or one of his executives negotiates and has complete control over the collective bargaining agreements of that enterprise. A review of this and other evidence conclusively demonstrates that at the very least a substantial factual issue exists for primary determination

by the National Labor Relations Board, and accordingly, that there was reasonable cause to believe that Appellants' conduct constituted a violation of Section 8(b)(4)(i)(ii)(B) of the Act. In no event could it be seriously contended that the District Court's ruling in this regard was clearly erroneous.

Finally, it is shown that the District Court did not abuse its discretion in denying Appellants' request for discovery and requiring that the show cause hearing be based on affidavits rather than oral testimony. It is pointed out that the District Court's role in a Section 10(l) proceeding is confined to determining whether there is reasonable cause, and that this requirement is met when the evidence establishes that there is a substantial factual issue to be determined by the National Labor Relations Board. The discovery requested by Appellants would at best have only created evidentiary conflicts or credibility issues which the District Court did not have jurisdiction to resolve. Many of the authorities relied upon by Appellants are cases in which the Board had not filed affidavits supporting its Section 10(l) petition, and limited discovery was allowed only for the purpose of insuring that respondents would not be surprised by the oral testimony which the Board intended to present at the hearing. In this case however, Appellants were furnished with all of the evidence upon which the Regional Director

based his petition and there was thus no such need for discovery. Moreover, it has long been held in this Circuit that a preliminary injunction may be granted on the basis of evidence presented solely by affidavits. In these circumstances, it is clear that the District Court's orders denying Appellants' requests for depositions and oral testimony were not clearly erroneous.

ARGUMENT

I. UNDER THE "REASONABLE CAUSE" STANDARD OF SECTION 10(l), A PRELIMINARY INJUNCTION SHOULD BE GRANTED IF THE DISTRICT COURT FINDS THAT THE PROPOSITIONS OF LAW AND FACTUAL ALLEGATIONS UNDERLYING THE REGIONAL DIRECTOR'S PETITION ARE NOT INSUBSTANTIAL AND FRIVOLOUS, AND ON APPEAL, THE SCOPE OF REVIEW IS LIMITED TO A DETERMINATION OF WHETHER THE DISTRICT COURT'S FINDINGS ARE CLEARLY ERRONEOUS.

Sections 10(j) and 10(l) of the National Labor Relations Act set forth a statutory scheme authorizing the National Labor Relations Board to petition the federal district courts for preliminary injunctive relief ancillary to an unfair labor practice proceeding pending before the Board. Although Section 10(j) grants the Board discretionary power to seek a preliminary injunction, Section 10(l)

provides that when a complaint is filed charging certain enumerated unfair labor practices such as a secondary boycott, the Board must petition for injunctive relief if the Regional Director has "reasonable cause to believe such charge is true". This mandatory nature of Section 10(l) reflects Congressional recognition of the seriousness of the immediate injury to the public resulting from conduct such as a secondary boycott. As stated by this Court in Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F.2d 525 (9th Cir. 1965):

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined whenever a district court has been shown [court's emphasis] reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction. [Citations omitted]. It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of the Congress." (351 F.2d at 531).

In view of this "Congressional policy favoring the granting of temporary injunctions under Section 10(l)

of the Act," (Local No. 83, Construction Drivers Union v. Jenkins, 308 F.2d 516, 517 fn.1 (9th Cir. 1962) and because of the primary jurisdiction vested in the Board for the adjudication of unfair labor practice charges, the courts have uniformly recognized that judicial review of Section 10(1) petitions should be narrowly confined. Appellants' argument, however, disregards this fact, and proceeds on the assumption that the merits of the complaint were before the Court below that this Court should fully review the District Court's findings. It is therefore important, as a threshold matter, to focus on the confined nature of the District Court's role in a Section 10(1) proceeding, and the limited scope of review on appeal from an order granting an injunction in a Section 10(1) proceeding.

A. The Court's Role In A Section 10(1) Proceeding Is Confined To Determining Whether The Regional Director Has Reasonable Cause To Believe That An Unfair Labor Practice Has Been Committed, And All That This Requires Is The Prima Facie Establishment Of Facts From Which An Inference Might Be Drawn That The Charge Is True.

The sole issue before the District Court at a hearing on a petition for an injunction pursuant to Section

10(1) is whether the Regional Director has "reasonable cause" to believe that the named respondents have violated the Act as alleged by him in his petition. The limited scope of the court's function was described in Kennedy v. Los Angeles Joint Executive Board of Hotel and Restaurant Employees, 192 F.Supp. 339 (S.D.Cal. 1961):

> "Under the Act the remedy sought in the courts is temporary [Court's emphasis] in nature because it is effective only until the Board, in adversary proceedings before it, determines the correctness or incorrectness of the charges. For this reason the question before the court, in a proceeding of this character, is not the existence or nonexistence of the practices contained in the charges before the Board, but whether in instituting this proceeding the Director 'has reasonable cause to believe that such charge is true' 29 U.S.C.A. § 160(1).
>
> "The courts have uniformly held that all this requires is the prima facie establishment of the facts from which an inference might be drawn that the charge is true.* If this be so,

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* Here, and elsewhere in the quoted passages set forth in this Brief, emphasis is supplied unless it is noted otherwise.

injunction issues, whether the charges are ultimately proved true in the proceedings before the Director or not." (197 F.Supp. at 341).

In order to establish the factual elements of "a prima facie case" it is not necessary for the Regional Director "to present uncontradicted testimony". Local 450, International Union of Operating Engineers v. Elliott, 256 F.2d 630, 638 (5th Cir. 1958). "Credible evidence, establishing a prima facie case, is sufficient." Greene v. Bangor Building Trades Council, 165 F.Supp. 902, 903 (N.D.Me. 1958). Nor is it necessary that the Regional Director establish the factual elements of his charge by a preponderance of the evidence:

> "No preponderance of the evidence is necessary, merely a showing of 'reasonable cause', [Citation omitted] and the Court may not resolve conflicting factual evidence and questions of credibility if the Board might reasonably resolve those issues in favor of the plaintiff . . ." (Fusco v. Richard W. Kaase Baking Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962) [Commenting on the analogous "reasonable cause" requirement under Section 10(j)].

Thus, as this Court has stated, if the pleadings raise a substantial issue of fact, that in itself is

sufficient to establish reasonable cause:

> "Ordinarily a dispute as to a material question of fact precludes a judgment on the pleadings, but the dispute as to the question raised by the pleadings in the instant case was not within the providence of the District Court to resolve; it was one for the Board to decide. It seems apparent, and the District Court so found, that the Board could find either that the certification covered the three Goodrich employees at the Union Rock plant or that it did not. That being the case, there existed reasonable cause raised by the pleadings that Appellant was engaging in unfair labor practice, thus justifying the issuance of the injunction." (Local No. 83, Construction Drivers Union v. Jenkins, 308 F.2d 516, 517 (9th Cir. 1962).

Thus, the District Court need not find that there is a probability that the National Labor Relations Board will resolve disputed questions of fact in favor of the petitioner, but merely that there is sufficient evidence from which the Board could find a violation of law.

> "The phrases 'reasonable cause' or 'reasonable grounds' are standard in law. Their meaning, when made a conclusion for action, has long been established. The

test by which compliance is determined is whether the facts are such that a reasonable person could be led to believe that they constitute a violation of law. They need not be sufficient to actually prove such violation." (LeBaron v. Los Angeles Bldg. & Constr. Trades Council, 84 F.Supp. 629, 635 (S.D.Cal. 1949), aff'd 185 F.2d 405 (9th Cir. 1950).

The statutory standard of "reasonable cause" is equally applicable to disputed questions of law. As stated in Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n., 292 F.2d 182 (3rd Cir. 1961):

"The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous." (292 F.2d at 187).

Thus, if "substantial questions of statutory determination are presented", reasonable cause is established. Local Joint Bd., Hotel and Restaurant Employees v. Sperry,

323 F.2d 75, 77 (8th Cir. 1963); Kamoff v. Local Union No. 542-A, 238 F.Supp. 376, 382 (M.D.Penn. 1964), aff'd., 341 F.2d 589 (3d Cir. 1965). The Regional Director need only show that the legal propositions underlying his petition have some basis in reason, not that they are the correct interpretation of the Act. Reasonable cause is established if the Director shows that there is a reasonable possibility that the Board might adopt his interpretation of the Act.

> ". . .[I]t appears that the existence of a possible reasonable interpretation of the Act which would make the conduct of the union subject to complaint of an unfair labor practice would, of itself, suggest that the Board would have reasonable cause to believe that an unfair labor practice has been committed. . . . [W]here a reasonable interpretation of the Act might render the union guilty of an unfair labor practice, and the Court is of the opinion that such a reasonable interpretation might exist in this case, the ultimate issues, legal as well as factual, should be left to the decision of the Board. (Sperry v. Local Joint Bd, Hotel and Restaurant Employees Union, 216 F. Supp. 263, 266 (W.D.Mo.), aff'd. 323 F.2d 75 (8th Cir. 1963)).

Even where the proposition of law advanced by the Regional Director is "novel", a Section 10(l) injunction should issue unless the inferences to be drawn from the decided cases completely exclude the possibility that his interpretation of the Act will be adopted by the Board.

". . . [T]he Board is 'the primary interpreter of the statutory scheme', a function which should not be usurped by the District Court in determining 'novel questions of labor law'. Obviously, where, as here, the question of law is 'novel', this Court perforce does not have the benefit of the Board's, or of any other, opinion. The statutory scheme does not contemplate a definitive decision by the District Court under such circumstances. We must decide only whether the Board's position is reasonable and not frivolous. Here, the Board's legal position may be uncertain when tested by appropriate legal standards [Citations omitted]. However, we do not believe that it is either unreasonable or frivolous, since the inferences to be drawn from the decided cases do not completely exclude the possibility that the Board's position is correct." (Schauffler v. Local No. 677, Int'l. Union, United Automobile,

Aircraft & Agricultural Implement Workers,
201 F.Supp. 637, 638 (E.D.Penn. 1961).

The legal premise underlying the Regional Director's petition in this case is that different and autonomous divisions of a single corporation may be considered separate employers within the meaning of Section 8(b)(4)(B) of the Act. Appellants' brief incorrectly assumes that the District Court's order herein must be predicated upon a finding "that the Board will adopt such a rule." (Appellants' Brief, pp. 8, 11). To the contrary, however, the District Court was only required to find a reasonable possibility, and not a probability, that the Board would adopt the Regional Director's interpretation of the Act. The question before the District Court was not whether the Board would adopt the rule of law relied upon by the Regional Director but whether the Board reasonably could adopt that rule.

So much for the "reasonable cause" standard of Section 10(l). We turn now to the related, but distinct, question of the limited scope of Appellate review which results in a further narrowing of the issues to be considered by this Court.

B. Upon Appeal From An Order Granting A Preliminary Injunction Pursuant To Section 10(l), The District Court's Finding Of "Reasonable Cause" Will Not Be Set Aside Unless The Same Is Clearly Erroneous.

"The scope of review of Section 10(1) proceedings is limited to a determination whether the district court's finding that there is reasonable cause . . . is clearly erroneous." Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n., 292 F.2d 182, 187 (3d Cir. 1961).

As stated by this court in Local 83, Constr. Drivers Union v. Jenkins, 308 F.2d 516 (9th Cir. 1962):

> "To set aside an order granting a temporary injunction under Section 10(1) of the Act, it must appear that the District Court's finding that there was reasonable cause to believe the Act was being violated was clearly erroneous. Warehousemen's Union v. Hoffman, 302 F.2d 352 (9th Cir. 1962). 'It is sufficient to sustain the District Court's finding and conclusion if there be any evidence which together with all of the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a violation has occurred.' Madden v. International Hod Carriers, 277 F.2d 688, 692 (7th Cir. 1960)." (308 F.2d at 517-18).

This Court has clearly differentiated between

the very limited scope of appellate review when an injunction is granted, and the broader scope of review when an injunction is denied, stating that this difference is justified "Because of the Congressional policy favoring the granting of temporary injunctions under Section 10(1) of the Act . . . ." Local 83, Constr. Drivers Union v. Jenkins, supra, 308 F.2d at 517, n.1. Thus, the question presented on this appeal is merely whether there is any substantial evidence in the record supporting the District Court's finding of "reasonable cause". This Court's function is that of "simply reviewing discretion exercised below in a § 10(1) setting." Madden v. International Organization of Masters, Mates & Pilots, 259 F.2d 312, 313, cert. denied, 358 U.S. 909 (1958).

The very limited scope of review of an order granting a preliminary injunction in a Section 10(1) proceeding had been recognized not only by this Court but by other courts of appeal. As stated by the Court of Appeals for the Sixth Circuit in American Federation of Radio & Television Artists v. Getreu, 358 F.2d 698 (1958):

> "At the outset we emphasized the limited scope of our function on this appeal. Section 10(1) of the Act requires that the district judge, as a prerequisite for the issuance of a temporary injunction, need only find that there is reasonable cause

to believe that a violation of Section 8(b)(4)(A) of the Act as charged has been committed. . . . Review here is further confined by Rule 52(a), F.R.Civ.P., 28 U.S.C.A., to determining whether the District court's finding of reasonable cause was clearly erroneous." (258 F.2d at 699).

To the same effect are: Warehousemen's Union Local 6 v. Hoffman, 302 F.2d 352, 354 (9th Cir. 1962); Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n., 292 F.2d 182, 187 (3d Cir. 1961); Madden v. International Hod Carriers, 277 F.2d 688 (7th Cir.), cert. denied, 364 U.S. 863 (1960); Madden v. International Organization of Masters, Mates & Pilots, 259 F.2d 312, cert. denied, 358 U.S. 909 (1958); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967); Retail, Wholesale & Dept. Store Union v. Rains, 266 F.2d 503, 506 (5th Cir. 1959); Schauffler v. Highway Truck Drivers & Helpers, 230 F.2d 7, 9 (3d Cir. 1956); Local Joint Bd., Hotel and Restaurant Employees v. Sperry, 323 F.2d 75, 77 (8th Cir. 1963).

In contrast to the above cases, the only court which has held that the "clearly erroneous" standard is inapplicable to appeals from a Section 10(l) proceeding is the Court of Appeals for the Second Circuit. In McLeod v. Business Machine & Office Appliance Machines Conf. Bd., 300 F.2d 237 (2d Cir. 1962), where the Regional Director

had been granted an injunction premised upon an interpretation of Section 8(b)(4)(B) which was clearly precluded by previous Board decisions, the court stated that it need decide only whether the judge below was wrong, not whether his conclusions were clearly erroneous. The Court concluded that in cases where the legal propositions relied upon by the Regional Director are "clearly precluded" by previous Board decisions, the "reasonable cause" standard requires that the Regional Director must show that there is reasonable cause to believe both that the Board will reverse its previous position and that its order will be enforced by a court of appeals. Relying upon this case and the Second Circuit's subsequent decision in a Section 10(j) proceeding, McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966), Appellants argue that in this case the standard for review is "whether the judge below was wrong, not whether his conclusions were clearly erroneous," (Appellants' Brief p. 24) and that this Court "must make its own analysis of the applicable law and determine whether there is legal precedent for the Regional Director's position." (Appellants' Brief, p. 29). It is clear, however, that no other court of appeals has accepted the Second Circuit's position that the scope of review from a Section 10(l) proceeding is broader than the "clearly erroneous" standard. And the cases demonstrate that this is true even where there is substantial dispute as to the validity of the propositions of law

advanced by the Regional Director. Thus, in Schauffler v. Local 1291, Int'l. Longshoremen's Association, 292 F.2d 182, 187 (3d Cir. 1961)*, the court explicitly stated that the district court is merely required to find that the propositions of law advanced by the Regional Director are "substantial and not frivolous", and that upon appeal from such a finding, the scope of review by the appellate court "is limited to a determination whether the district court's finding . . . is clearly erroneous." Similarly, in Local Joint Bd., Hotel and Restaurant Employees v. Sperry, 323 F.2d 75 (8th Cir. 1963), the court held that the scope of review from a Section 10(l) proceeding was limited to a determination of whether the trial court's finding of reasonable cause was "clearly erroneous", notwithstanding the fact that such finding was premised upon an interpretation of the Act involving "many complex legal problems which have not been passed upon by the Supreme Court" and with respect to which members of the National Labor Relations Board had divided in previous decisions. The court made clear that its discussion with respect to the

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Cited with approval by this court in Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F.2d 525, 531 (9th Cir. 1965); Warehousemen's Union Local 6 v. Hoffman, 302 F.2d 352, 353 (9th Cir. 1962).

disputed issue of statutory interpretation was "only for the purpose of illustrating that substantial questions of statutory determination are presented." (323 F.2d at 77).

Thus, the first question presented in this case is not, as Appellants urge, "whether the district court erred in finding and concluding that the newspaper divisions of The Hearst Corporation were genuinely neutral employers . . . and . . . that there is reasonable cause to believe appellants had violated Section 8(b)(4)(i)(ii)(B) of the Act". The question before this Court is whether the District Court's finding was clearly erroneous. The District Court was not required to find that the newspaper divisions of The Hearst Corporation were genuinely neutral employers. It found that there was reasonable cause to believe that they were genuinely neutral employers, and this finding required no more than the establishment of a substantial factual question concerning that issue. If the District Court's finding of reasonable cause, predicated as it must have been upon a finding of factual and legal issues which are substantial and not frivolous, was not clearly erroneous, this Court must affirm.

II. THE DISTRICT COURT'S FINDING THAT THERE WAS REASONABLE CAUSE TO BELIEVE THAT APPELLANTS HAVE ENGAGED IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b)(4)(i)(ii)(B) OF THE ACT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

A. The Regional Director's Contention That Autonomous Divisions Of A Single Corporation Can Be Considered Separate Employers Within The Meaning Of Section 8(b)(4)(B) Is Premised On An Interpretation Of The Act Which Is Not Clearly Unreasonable Or Frivolous.

Appellants contend that there is "no reasonable cause to believe that the picketing under the circumstances of this case was proscribed by Section 8(b)(4) of the Act, since The Hearst Corporation is a single legal entity and neither the National Labor Relations Board or the courts have ever found different divisions of a single legal entity to constitute neutral employers entitled to the protection of Section 8(b)(4) of the Act." (Appellants' Brief, p. 6). Appellants have thus focused their argument on The Hearst Corporation's status as a "single legal entity", and have almost wholly disregarded the fact that the preliminary injunction issued by the District Court relates also to the secondary picketing of the San Francisco Chronicle and the San Francisco Printing Company, both of whom are separate legal entitles distinct from The Hearst Corporation.

With respect to the Los Angeles Herald-Examiner, the San Francisco Examiner, and other Hearst divisions, Appellants argue that these various enterprises must all be considered a single employer by virtue of the fact that The Hearst Corporation is a single legal entity. In support of this argument, Appellants stress that "in the more than twenty-year period since the passage of the Taft-Hartley Act, neither the National Labor Relations Board nor any court has ever held that the picketing of different divisions, branches, or stores of a single legal entity constitutes a violation of Section 8(b)(4)(B)." (Appellants' Brief, p. 8). Although this is true, Appellants' reliance on this bit of history does not prove that the legal issue here in question is frivolous. For the National Labor Relations Board has only considered this precise issue in one case, Alexander Warehouse & Sales Co., 128 N.L.R.B. 916 (1960). Although the Board in Alexander found that the corporate divisions in that case did not constitute separate employers within the meaning of Section 8(b)(4)(B), the Board significantly did not base its decision upon an interpretation of the Act which would preclude such a conclusion as a matter of law. It focused upon a detailed analysis of the facts which demonstrated that the divisions there involved were not operated as autonomous enterprises. The decision in Alexander Warehouse thus clearly establishes that the legal proposition underlying the Regional Director's

petition herein is "substantial and not frivolous."

In Alexander Warehouse the employer was engaged in the purchase, sale and distribution of coal and other supplies at warehouses in Joliet, Peoria and Urbana, Illinois. The respondent union, which represented the Joliet employees, picketed at the Urbana and Peoria warehouses in support of its strike at the Joliet warehouse. The Board found that the Urbana and Peoria warehouses were non-neutrals within the meaning of the Act. Adverting to the "ally" doctrine, which permits picketing of an enterprise which allies itself with the primary employer, the Board stated that "a fortiori if an 'ally' is not sufficiently neutral to permit a distinction to be drawn between it and the primary employer for purposes of applying the secondary boycott provisions of the Act, Alexander's Peoria and Urbana warehouses cannot be regarded as premises of a neutral employer here." That the Board did not conceive of this statement as establishing a rule of law is manifest from the language immediately following the foregoing excerpt of its opinion. For, in explanation of why Alexander's Peoria and Urbana warehouses could not be regarded as premises of a neutral employer, the Board went on to state in detail the evidence which showed that Alexander's operations were centrally controlled*.

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* At the threshold of its opinion, the Board had stated its conclusion that "Alexander's operations are centrally controlled." (128 NLRB at 916).

"Those premises, together with the Joliet warehouse, are operated under common general supervision; their purchases are made by a central purchasing office; they participate in pool shipments of supplies in order that Alexander may receive the benefits of lower freight charges; and there is some interchange of inventories between the three warehouses. Thus, the continued operation of the Peoria and Urbana warehouses during the Respondents' strike at the Joliet warehouse constituted, because of their proximity to, and integration with, the Joliet warehouse, a factor which conceivably could have been decisive in determining the outcome of the dispute, and Respondents could legitimately extend their picketing to those premises." (128 NLRB at 919).

Thus, instead of holding that the separate facilities owned by the same legal entity could not, as a matter of law, be considered anything but a single employer within the meaning of the Act, the Board found that the non-struck warehouses were factually allied with and integrated with the Joliet warehouse, and therefore, that they were not neutrals. The finding of such an alliance or potential alliance was not even based on the single corporate ownership

of the three. Nor, indeed, was this factor of fictional corporate identity even enumerated as one of the relevant criteria. In the Board's view, the relevant criteria for determining whether the warehouses constituted separate or single employers were: joint supervision, pooled shipments of supplies, central purchasing, interchange of inventories and the possibility that the Urbana and Peoria warehouses might be used to handle struck work of the Joliet warehouse. The clear implication of the Board's decision is that in the absence of these various factors, the mere fact of fictional corporate unity would not have precluded a finding that the separate facilities were separate employers within the meaning of the Act.

Implicit in the Alexander Warehouse decision is the legal proposition that common ownership of separate enterprises is not sufficient, in the absence of a showing of actual common control, to justify treating separate enterprises as a single employer for the purposes of Section 8(b)(4)(B). Indeed, it has clearly been established that "common control" rather than "common ownership" is the test to be applied in determining whether two enterprises constitute separate employers within the meaning of Section 8(b)(4)(B).

In J. G. Roy & Sons, 118 NLRB 286 (1957), the facts presented to the Board in an unfair labor practice proceeding disclosed that Roy Lumber Company, the primary

employer, and Roy Construction Company, the secondary employer, each a separate corporation, were commonly owned by five brothers. The stock of each company was held in equal amounts by the five brothers, and all five were directors of each company. Two brothers were officers of the lumber company, while two other brothers were officers of the construction company. All four officers received equal salaries. Although the companies maintained separate offices and records, and did not have common employees, the trial examiner found that "whether or not the brothers participate in decisions of the company in which they are not officers, as directors they have the power to participate in management decisions." The Board agreed with the Trial Examiner and held that an ally relationship is established "where the businesses of the primary and secondary employers are commonly owned and controlled." (118 NLRB at 288).

The decision of the Board was set aside in J.G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), adopted by the NLRB on remand, 120 NLRB 1016 (1958). In the court's view, the facts established only potential common control rather than actual common control. It concluded that two enterprises could be considered a single employer only if there was "substantial evidence of actual common control":

". . . [W]hile common ownership was admitted, it was specifically found that there was no

actual common control over labor policies or any other phase of the operations of Roy Lumber and Roy Construction. There was of course potential common control, but this is always possible where there is common ownership. The Board itself recognized that there must be more than the potential control inherent in common ownership for it specifically stated that common ownership and [court's emphasis] control were necessary in this case to establish an ally relationship. There was entirely lacking here any substantial evidence of actual common control and, therefore, the Board was in error in relying on this ground when it denied the petition and the protection of § 8(b)(4)(A) and (B)." (251 F.2d at 773-74).

Subsequently, the Board applied the "actual common control" test in Bachman Machine Company, 121 NLRB 1229 (1958). Plastics Molding, the primary employer, and Bachman Machine Co., the secondary employer, were each corporations whose capital stock was held by five members of one family. The officers and boards of directors of each corporation were drawn entirely from members of the family, and William N. Bachman who owned 75 percent and 67.5 percent of the stock of Bachman Machine Co. and Plastics Molding, respectively, was president of both corporations. The

evidence showed that there was a substantial amount of business done between the two corporations and that William Bachman, as president of both companies, controlled or participated in the control of the labor relations of the primary employer. The Trial Examiner concluded that both enterprises should be considered a single employer because of the "common ownership and actual common control over labor policies", and the Board affirmed this finding, dismissing the unfair labor practice complaint.

On a petition to review the Board's decision in Bachman, the Court of Appeals for the Eighth Circuit set aside the Board's decision. Bachman Machine Company v. NLRB, 266 F.2d 599 (8th Cir. 1959). Since the Board had applied the test of "common ownership and actual common control", the sole question for review was whether there was an adequate evidentiary basis for the Board's determination that the two enterprises involved were in fact commonly controlled. The court recognized that there "was substantial evidence to support a finding that, during the negotiations between Plastics and the union, Mr. Bachman actively participated and made decisions." (266 F.2d at 602). But such evidence, in the court's view, was insufficient as a matter of law to satisfy the requirement of actual common control:

> ". . . [W]e think the evidence fell short of establishing that both companies were

under such actual common management or control as to make them allies and a single employer for the purposes of Section 8(b)(4)(A) of the Act. . . . We fail to see why Bachman should, under the evidence, be regarded as an offending employer or why it and its employees should be embroiled in the controversy between Plastics and its employees and their Union, merely because the President of Bachman, who was also the President of Plastics, controlled or participated in the control of the labor relations of that company." (266 F.2d at 605).

Appellants argue in their brief (pp. 28029, 39-40) that the Board has not accepted the Circuit Court decisions in J. G. Roy & Sons and Bachman Machine Co. Yet in Bachman the Board applied the actual-common-control test, and the Circuit Court reversed, not because the Board had applied an erroneous test, but because it found there was an inadequate evidentiary basis for finding actual common control. And although the Board did state in a footnote to its decision in Acme Concrete & Supply Corp., 137 NLRB 1321, 1323 n.2 (1962) that it had accepted the Courts' decisions in Roy and Bachman only as the law of those cases, the Board subsequently made it clear in Miami Newspaper Printing

Pressmen Local No. 46 (Kinght Newspapers, Inc.), 138 NLRB 1346 (1962) that it was adopting the actual-common-control test formulated in the Roy and Bachman decisions.

In Knight Newspapers, the alleged secondary employer was Knight Newspapers, Inc., an Ohio corporation, which published the Detroit Free Press. The alleged primary employer was the Miami Herald Publishing Company, a corporation which was wholly owned by Knight Newspapers. All of the stock of Knight Newspapers was owned by three members of the Knight family, James, John and Clara Knight. James Knight was general manager of the Miami Herald. John Knight was president and a director of both corporations, and Clara and James Knight served on both boards of directors. In a Section 10(l) proceeding the district court applied the actual-common-control test and issued an injunction premised on the finding that there was reasonable cause to believe that the Detroit Free Press and the Miami Herald were separate employers, notwithstanding their common ownership. Roumell v. Miami Newspaper Printing Pressmen, 198 F.Supp. 851 (E.D.Mich. 1961).

In the subsequent Board case, Miami Printing Pressmen's Local No. 46 (Knight Newspapers, Inc.), 138 NLRB 1346 (1962), the Board affirmed the Trial Examiner's findings that the union had violated Sections 8(b)(4)(i)(ii)(B) by picketing Knight Newspapers, Inc. at the Detroit Free Press in support of its economic strike against the

Miami Herald:

> "The record shows the Detroit Free Press is owned and published by Knight Newspapers, Inc., which is also the parent of the corporation owning and publishing the Miami Herald; that, notwithstanding the fact of single ownership, and the existence of some common officers and directors of the two corporations, they are operated in substance as separate and autonomous corporations, publishing newspapers in communities 800 miles apart. . . .
>
> ". . . [The evidence is] insufficient to establish that the Detroit Free Press and the Miami Herald are operated as a single integrated business operation. . . . [N]otwithstanding the closely held nature of the two corporations and the potentiality of integrated operations under common control that does exist, the Detroit Free Press and the Miami Herald are operated independently of each other, as separate autonomous newspaper enterprises." (138 NLRB 1347-48).

Sifnificantly, in the Trial Examiner's report which was adopted by the Board, the Trial Examiner cited the Circuit Court decisions in Roy and Bachman as establishing

the actual-common-control test, and commented that in Amalgamated Lithographers of America, 130 NLRB 985 (1961) "the Board unambiguously indicated that it acquiesced in the principal enunciated by the circuit courts of appeals in" the Roy and Bachman cases. (138 NLRB at 1352).

Were there any doubt about the validity of the actual-common-control test, it was laid to rest when the Court of Appelas for the District of Columbia enforced the Board's order in Miami Newspaper Pressmen's Local v. NLRB, 322 F.2d 405 (D.C.Cir. 1963). Citing with approval the Circuit Court decisions in Roy and Bachman, the court stated that "both the Board and the courts have consistently and repeatedly held that common ownership alone does not suffice" for establishing that two enterprises are a single employer within the meaning of the Act. (322 F.2d at 408). The court further stated:

> "There must be . . . an actual . . . integration of operations and management policies. Two business enterprises, although commonly owned, do not for that reason alone become so allied with each other as to lift the congressional ban upon the extension of labor strife from the one to the other.
>
> "Although the Union argues that common ownership alone is sufficient to

justify its bringing the Free Press within the orbit of its legitimate strike pressure, it does not - as it cannot - rest, in the last analysis, on this claim." (322 F.2d at 409).

Of equal significance for this case was the stress placed by the court upon the many factors which necessarily contribute to the independent nature of newspaper organizations operated in different cities:

"These two metropolitan daily newspapers appear to have had separate and largely unrelated lives of their own, despite their common ownership. Published hundreds of miles apart in two distinctive urban communities of the United States, each paper went its way under independent direction supplied locally, as they must have done in order to be successfully responsive to the varying needs of their two unrelated readerships. A newspaper reflects in significant measure the peculiar personality of its locale. To the extent that it does so in fact, its commercial success is to that degree correspondingly assured. Wise publishers know this to be true and shape their arrangements and policies accordingly.

This appears to be the case here."
(322 F.2d at 409).

More recently, the Board applied the actual-common-control test in Drivers, Chauffeurs and Helpers Local No. 639 (Poole's Warehousing, Inc.), 158 NLRB 1281 (1966). In this case the alleged primary employer was Poole's Drayage Co., a partnership between Charles W. Poole and his brother Brereton Poole. Drayage was engaged in the business of trucking perishable commodities. The alleged secondary employer, located two miles from Drayage, was Poole's Warehousing, Inc.,which was engaged in the business of storing grocery commodities for producers. The Poole brothers were the sole shareholders and were president and vice president of Warehousing. Although Charles Poole was the general manager of Drayage, its day-to-day operations and labor problems were supervised by a traffic manager, Mr. Stevens. The warehousing operations were run by Edward Hampl, as manager. Although Warehousing maintained separate account books, a separate bank account, and separate accounts receivable, it shared the same general office with Drayage. In addition Warehousing and Drayage employed a common bookkeeper who worked in the general office on the premises of Drayage. Approximately 7 percent of Drayage's gross receipts were from hauling items stored at Warehousing.

On the foregoing facts, the Trial Examiner found

that Warehousing and Drayage could not be considered a single employer for purposes of Section 8(b)(4)(B). In his opinion, which was adopted by the Board, he made it clear that common ownership was not sufficient to establish active common control:

> "Considering the decision of the court of appeals in the Miami case, the decision in the Trial Examiner's Report which the Board adopted in that case, and the Board's decision in Amalgamated Lithographers of America (Miami Post Company), 130 NLRB 968, where the Board cited with approval the decisions of the circuit courts of appeals in the Roy and Bachman cases, it would appear that the following must be established before one of two commonly owned companies will be held not to be entitled to the protection of Section 8(b)(4) of the Act:
>
> "Common ownership alone is not sufficient. There must be in addition such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies.

* * * *

". . . While potential control over Warehousing may reside in the Poole brothers, the actual or active control of the day-to-day operations is in the hands of Manager Hampl. . . ." (158 NLRB at 1286).

There can thus be no doubt that the actual-common-control test is accepted by the Board and the courts. Indeed, in the most recent Section 10(1) proceeding involving this issue, the district court granted an injunction premised upon that rule, stating that "common ownership alone does not suffice to demand that separate entities be treated as one." Hoban v. Local 559, Int'l. Bhd. of Teamsters, 55 CCH Lab.Cas.Par. 12007 (D.Conn. 1967).

Appellants contend that the actual-common-control test adopted by the above line of authorities is applicable only where there are distinct and separate legal entities and not when the enterprises involved are unincorporated divisions of the same corporation. In Appellants' view, the rule "was adopted for the purpose of preventing employers from limiting the basic right of unions to picket by adopting the subterfuge of separate corporate entities," and application of the common control test to separate divisions of a single corporation would "distort and reverse that rule to achieve a result which is the precise opposite of its purpose and effect." (Appelants' Brief, p. 24). But this argument finds no

support in the above discussed cases. For there is no language in any of those cases which even remotely suggests that the courts or the Board conceived of the rule as a device for preventing "subterfuge" by employers. Indeed, the rule was conceived in Roy and Bachman, and invoked in Knight Newspapers and Poole's Warehousing, not to prevent subterfuge by employers but to extend to independent enterprises, even though commonly owned, the protection of Section 8(b)(4)'s ban on secondary boycotts. The principle underlying the rule is even-handed. It protects enterprises that are operated independently of the primary business; and it protects the union's right to picket a business which is not genuinely independent from the primary employer.

Not a single one of the above-discussed cases predicates the application of the actual-common-control rule on the presence or significance of one or more corporate personalities. The common denominator of the cases is that they look through form to substance. And, this rationale is equally applicable whether a labor dispute involves one fictional corporate personality or two. In either case, the rule commands the court to look to the economic realities of intercorporate or intracorporate relationships. This is manifestly evident from the manner in which the Board reached its decision in Alexander Warehouse. For as we have seen, in that case the Board did not rest its decision on the touchstone of corporate

personality, but rather, it carefully analyzed the economic realities of the situation to determine whether or not the three separate warehouses were in fact commonly controlled and integrated operations.

Appellants' argument is thus an incantation to the sanctity of form. It ignores the fact that businessmen arrange enterprises in different legal modes for purposes of commercial law, wholly unrelated to considerations which obtain in the formulation of national labor policy. As recently stated by Mr. Justice Stewart:

> "The [Supreme] Court has emphasized in the past that . . . differences in form often do not represent 'differences in substance' Simpson v. Union Oil Co., 377 U.S. 13, 22.
>
> "Draftsmen may cast business arrangements in different legal modes for purposes of commercial law, but these arrangements may operate identically in terms of economic function and competitive effect." (United States v. Arnold, Schwinn & Co., 388 U.S. 365, 393 (1967) (concurring opinion).

The courts have accordingly not been reluctant to disregard the form of corporate unity in determining whether separate divisions are in fact autonomous. For example, in Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp.

581 (S.D.N.Y. 1966), the court stated that it would "look to substance rather than form" in order to determine whether a seemingly autonomous division of a corporation could be considered a customer of that corporation within the meaning of the Robinson-Patman Act. And more recently, when confronted with the issue of whether autonomous divisions of a single corporation could be considered separate persons under the anti-trust laws, a court concluded that the mere fact of single legal identity did not preclude such a finding. Hawaiian Oke & Liquors v. Joseph E. Seagram & Sons, 1967 Trade Cases Par. 72186 (D.Hawaii 1967).

Hawaiian Oke was a private treble-damage action in which the plaintiff alleged a conspiracy in restraint of trade between four unincorporated divisions of the House of Seagram and three other companies. The defendants' argument that separate divisions of a single corporation could not be considered separate entities was rejected by the court, in language that is equally applicable here:

> "But are all corporations, in fact, 'persons' each with one brain, one nerve center, at which all decisions are reached? It is well settled that in corporate structures which consist of a parent corporation and incorporated subsidiaries, each entity is capable of conspiring. . . . The question, then, is what, if any, magic occurs when

the paper partition is removed. Is a business group which chooses to organize as a single corporation with unincorporated divisions automatically cast in the form of a normal person? Or may we have a corporate 'person' in the form of a multi-headed Siva, or as portrayed by Dali or Artzybasheff?

"Thus, whether a division is capable of conspiring depends on the particular facts demonstrated. Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the anti-trust laws. There is nothing sacrosanct about the 'unincorporated' aspect of corporate divisions." (pp. 84261-62).

Likewise in the field of labor relations, there is no reason to elevate the concept of corporate personality to the status of sacred dogma. An autonomous division of

of a conglomerate corporation may in fact have all the attributes of an independently operated business enterprise notwithstanding the fact that it lacks the fictional personality accorded by corporate birth. To focus on the question of whether it has a legal psyche wholly disregards the many relevant considerations such as common control of labor relations policies and operational integration which the Board and the courts have always looked to in determining the status of enterprises within the framework of Section 8(b)(4).

Here, we are concerned with a conglomerate corporation which has many autonomously operated divisions: seven newspaper divisions located in Albany, Baltimore, Boston, San Antonio, San Francisco, Los Angeles and Seattle; a magazine division which publishes twelve magazines; three radio and television divisions which operate in Pittsburg, Baltimore and Milwaukee; the King Features Syndicate division in New York City; two real estate divisions in New York City and San Francisco; an International Studio Art Division; a land and livestock division which operates western ranch and properties and timberlands; a specialty paper division which operates in Maine; and a newspaper supplies division. Had The Hearst Corporation chosen for commercial reasons to organize these diverse divisions as wholly owned corporate subsidiaries, there would be no question but that the "common control"

test would be applicable for purposes of determining whether the enterprises were separate employers within the meaning of Section 8(b)(4). "What, if any, magic occurs when the paper partition is removed?" Does the fact that Hearst has a single personality under commercial law give the employees in its Studio Art Division or its western ranches carte blanche to picket in Pittsburg or Baltimore?

As this court stated in Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F.2d 525, 531 (9th Cir. 1965), Section 10(l) reflects a Congressional determination to prevent "harm to the public" that is likely to result from the disruption of labor-management relations that occurs when the unfair labor practices enumerated therein are committed. The harm to the public in San Francisco caused by the Appellants' picketing of the Examiner, the Chronicle and the Printing Company is no less than it would have been had the Examiner been operated under the mantle of a legal personality.

So much for Appellants' plea for the sanctity of form. Suffice it to say that the legal issue herein involved is not insubstantial or frivolous. That was all that the Court below was called upon to decide, and clearly, in view of the Board's decisions in Alexander Warehouse and Knight Newspapers, it cannot seriously be contended that the legal proposition advanced herein by the Regional Director is wholly without basis in law. The respondents

in Knight Newspapers also challenged the common-control rule as being wholly without merit in the context of commonly owned newspapers, but the district court rejected their argument in language that is particularly applicable here:

> "The difficulties involved in reading coherent interpretations of our labor law are manifest. They ought not to be compounded by requiring the settling of these questions in the context of a hastily called injunction proceeding.
>
> "The rule of law relied upon by the petitioner may be questioned, but, as it certainly cannot be characterized as unsubstantial or 'frivolous', it is not for me at this time to pass upon its correctness."
>
> * * *
>
> "Respondent cogently argues that the sole owner of the primary employer can hardly be considered 'neutral'. This is especially true where, as here, the owner is not a mere financial holding company but rather owns the primary employer as part of a chain of similar (newspaper publishing) corporations.
>
> "Nevertheless, as the petitioner's view of this unsettled corner of the law is certainly

not without merit, nor 'frivolous' or unsubstantial, I must grant the temporary injunction if the evidence adduced indicates that petitioner has reasonable cause to believe that respondent violated the Act, as petitioner interprets it." (Roumell v. Miami Newspaper Printing Pressmen, 198 F.Supp. 851, 853-54 (E.D.Mich. 1961).

Similarly, here, "the inferences to be drawn from the decided cases do not exclude the possibility that the Board's position is correct." Schauffler v. Local No. 677 201 F.Supp. 637, 638 (E.D.Penn. 1961). In these circumstances, it is plainly evident that the lower court's finding of "reasonable cause" was not clearly erroneous.

B. The District Court's Finding That There Is Reasonable Cause To Believe That The Los Angeles Herald-Examiner Is Operated Autonomously And Independently Of The San Francisco Examiner, The San Francisco Chronicle And The San Francisco Printing Company Was Not Clearly Erroneous.

The Court below found that there is reasonable cause to believe that The Hearst Corporation, which has its principal office in New York City, maintains seven newspaper divisions consisting of the following: The Baltimore News American Division, The Boston Record American-Advertiser

Division, Capital Newspaper Division, The Los Angeles Herald-Examiner Division, The San Antonio Light Division, The San Francisco Examiner Division, and The Seattle Post-Intelligencer Division. The Court further found that there is reasonable cause to believe that the Chronicle Publishing Company, a Nevada corporation with its principal offices in San Francisco, is engaged in the publication in San Francisco of a daily newspaper known as the San Francisco Chronicle; that the Chronicle Publishing Company, jointly with the San Francisco Examiner, publishes a Sunday newspaper; that the San Francisco Printing Company, a Nevada corporation, is engaged in the business of newspaper printing, in connection with which it performs the mechanical, circulation, advertising, accounting, credit, and collection functions for both the San Francisco Examiner and the Chronicle; and that the Los Angeles Herald-Examiner is an autonomous enterprise operated independently of the Examiner, the Chronicle and the Printing Company; and that neither the day-to-day operations nor the labor relations policies of the Herald-Examiner, the Examiner, the Chronicle or the Printing Company are controlled by The Hearst Corporation.

The many affidavits filed in support of the Regional Director's petition for a preliminary injunction unequivocally establish that the day-to-day operations and labor policies of the Herald-Examiner are controlled only by its publisher George R. Hearst, Jr., and that there is

no "appreciable integration of operations and management policies" (Poole's Warehousing, Inc., 158 NLRB 1281, 1286 (1966)) of the Herald-Examiner and the other Hearst newspaper divisions, the Chronicle and the San Francisco Printing Company. In this connection, the affidavits of Richard E. Berlin, president of The Hearst Corporation, show that for many years it has been the practice of the Hearst Board of Directors to delegate full authority to the publisher of each of the Hearst papers to manage the normal affairs, the day-to-day operations and the labor relations policies and negotiations of his respective paper. None of the Hearst newspapers seeks approval from the corporation in order to establish operating policies, labor or otherwise, or to settle issues during any collective bargaining negotiations. As stated by Berlin, he himself has never taken an active part in the day-to-day operations or labor negotiations of any of the newspapers. Berlin's testimony that the Hearst newspapers are operated autonomously and independently of each other and are not controlled by the corporation is confirmed by the affidavits of George R. Hearst, Jr., publisher of the Los Angeles Herald-Examiner, Charles L. Gould, publisher of the San Francisco Examiner, and Dan L. Starr, publisher of the Seattle Post-Intelligencer. The affidavits of George R. Hearst, Jr., domonstrate that the Los Angeles Herald-Examiner is a completely autonomous enterprise and that

complete control is exercised locally over its business, the news it prints, its editorial policies, the features and columns it carries, the customers it serves, and the firms from which it purchases supplies. Hearst's affidavits show that the day-to-day operations and labor relations policies and practices of the Herald-Examiner are carried out under his supervision and control or under the supervision and control of the Herald-Examiner's general manager or managing editor. The Herald-Examiner sets its own labor policies and negotiates with unions independently of the other Hearst newspapers and of The Hearst Corporation. Its labor contracts vary greatly from those of the other newspapers, and there is no uniform pattern in the collective bargaining contracts the various newspapers have. Many of the other Hearst newspapers negotiate as parts of multi-employer bargaining units. As stated in the affidavit of Dan L. Starr, the Seattle Post-Intelligencer is a member of the Seattle Publishers Association and negotiates its labor relations contracts as a group with the Seattle Times. Similarly, the affidavit of Charles L. Gould shows that the San Francisco Examiner is a member of the San Francisco Newspaper Publishers Association, and that the Examiner negotiates its labor relations contracts as a group with the San Francisco Chronicle and the San Jose Mercury.

The affidavit of Charles L. Gould demonstrates that the San Francisco Examiner is completely autonomous

and independent of the Herald-Examiner. And the affidavit of Dan L. Starr shows that the same is true with respect to the day-to-day operations and labor-management policies of the Seattle Post-Intelligencer. Indeed, Mr. Starr states that the Seattle Post-Intelligencer purchases its cartoon features from the Los Angeles Times, the primary competitor of the Herald-Examiner.

As shown in the affidavit of Mr. L. A. Denny, Secretary-Treasurer of the Chronicle, that newspaper is wholly autonomous and independent from the Hearst organization. Hearst interests do not own any stock in the Chronicle. The Chronicle has absolutely no ties or connections with the Herald-Examiner. It has formal relations with the Examiner and the Printing Company only to the extent that its paper is printed by the Printing Company, 50 percent of whose stock is owned by Hearst and 50 percent by the Chronicle. Notwithstanding this fact, and the fact that the Chronicle publishes a Sunday newspaper jointly with the Examiner, the day-to-day operations of the Chronicle and its labor management policies are not even remotely connected with the operation or management of the Herald-Examiner.

The affidavit of Wells Smith, president of the Printing Company, shows that that corporation's day-to-day operations are wholly divorced from the management of the Herald-Examiner. Nor are the operations of the Printing

Company controlled in any respect by the Chronicle or the Examiner. The Printing Company is a member of the San Francisco-Oakland Newspaper Publishers Association, which acts as the collective bargaining representative of the Printing Company, the San Francisco Examiner, the Chronicle, the Tribune Publishing Company of Oakland, and Northwest Publications, Inc. (San Jose Mercury, San Jose News, and San Jose Mercury News).

Appellants' brief relies heavily on the decision of the Board more than thirty years ago in William Randolph Hearst, et al., 2 NLRB 530 (1937). But that decision reflected a state of facts which has long since changed. More importantly, it was decided more than a decade before passage of the Taft-Hartley amendments which made secondary boycotting illegal. It involved the entirely different issue of whether, in assessing liability for an unfair labor practice, allegedly separate employers could be considered one person, and hence jointly liable. The Board's determination of whether two or more enterprises would be jointly liable for an unfair labor practice, rendered in a factual setting which has been history for over three decades, is obviously irrelevant to a determination, under new statutory provisions involving far different considerations, of whether different enterprises as they are operated today should be considered "one employer" for purposes of Section 8(b)(4)(B).

In addition to the evidence presented by the affidavits filed by the Regional Director, this Court can clearly take judicial notice, as did the Court of Appeals for the District of Columbia in Miami Newspaper Pressmen's Local v. NLRB, 322 F.2d 405 (D.C.Cir. 1963), of the many factors which operate to isolate and separate as distinct enterprises newspapers published in geographically distant urban communities. In emphasizing that common ownership of the Detroit Free Press and the Miami Herald was not sufficient to support a finding that they were a single employer, the court stated:

> "These two metropolitan daily newspapers appear to have had separate and largely unrelated lives of their own, despite their common ownership. Published hundreds of miles apart in two distinctive urban communities of the United States, each paper went its way under independent direction supplied locally, as they must have done in order to be successfully responsive to the varying needs of their two unrelated readerships. A newspaper reflects in significant measure the peculiar personality of its locale. To the extent that it does so in fact, its commercial success is to that degree

correspondingly assured. Wise publishers know this to be true and shape their arrangements and policies accordingly." (322 F.Supp. at 409).

Here, too, we have newspapers which "have had separate and largely unrelated lives of their own", each being shaped in response to "the peculiar personality of its locale." It is difficult to conceive of two urban communities between which there is such a striking contrast as in the case of Los Angeles and San Francisco. Clearly, the evidence presented in the many affidavits filed by the Regional Director was sufficient to demonstrate that there was reasonable cause to believe that the Chronicle, the Printing Company, the Examiner and the Herald-Examiner are each operated as separate enterprises. At the very least, this evidence presented a substantial factual issue which can only be resolved, in the first instance, by the National Labor Relations Board; and the mere existence of that factual issue satisfies the statutory standard of "reasonable cause". Finally, addressing ourselves to the issue before this Court, it obviously cannot be maintained that it was clearly erroneous for the District Court to find that there was reasonable cause to believe that the Herald-Examiner is operated and managed autonomously and independently of the Examiner, the Chronicle, and the Printing Company.

III. THE DISTRICT COURT'S ORDER DENYING APPELLANTS' REQUEST FOR AN ORDER PERMITTING DEPOSITIONS AND/OR INTERROGATORIES AND/OR COMPELLING THE ATTENDANCE OF WITNESSES WAS NOT CLEARLY ERRONEOUS.

On January 23, 1968 Appellants filed with the Court below a request for an order permitting depositions and/or interrogatories and/or compelling attendance at the show cause hearing of eight named persons: William Randolph Hearst, Jr.; Richard E. Berlin; John B. Siefken; Frank Massi; George Hearst, Jr.; Dan L. Starr; Charles L. Gould; and Harold E. Kelsey. On January 30, 1968 the Charging Parties filed with the Court a memorandum objecting to Appellants' request for discovery, pointing out that the Regional Director had already filed twenty affidavits in support of his position and that since the evidence contained in these affidavits was demonstrably sufficient to support a finding of reasonable cause, even if contradicted, the discovery requested by Appellants would serve no useful purpose and would be an exercise in futility. On January 31, 1968, the District Court, after hearing arguments on the matter, denied Appellants' request, holding and concluding that in view of the Court's limited function in a Section 10(l) proceeding, discovery merely for the purpose of eliciting facts which would give rise to a conflict in the evidence or issues of credibility was

wholly unwarranted. The Court observed that since discovery would at best only create a conflict in the evidence or raise credibility issues, all of which would have to be resolved not by the Court but by the Board, to permit discovery to the extent sought by Appellants would be tantamount to converting the ancillary proceeding before the Court into a full inquiry into the merits of the controversy.

At the outset, it should be noted that Appellees do not contend that respondents in Section 10(l) proceedings generally are not entitled to the right of discovery accorded by the Federal Rules of Civil Procedure. That right of discovery, however, is clearly subject to being limited at the discretion of the trial court. Thus Rule 30(b) of the Federal Rules of Civil Procedure provides that the court may make an order that a deposition shall not be taken. In the proceeding below, the very fact that Appellants filed a request for an order permitting discovery was a recognition that discovery incident to such proceedings is a matter within the discretion of the court. In these circumstances, the memorandum filed by the Charging Parties in opposition to Appellants' request was tantamount to a motion for a protective order under Rule 30 (b). Moreover, the Charging Parties' memorandum clearly demonstrated that good cause existed for denying Appellants' request.

The Court below did not purport to base its ruling on a holding that respondents in Section 10(1) proceedings are never entitled to discovery. Rather, its ruling was predicated on a conclusion that discovery in this particular case would not serve any useful purpose. Thus the situation is quite analogous to a motion under Rule 56(e)* for an order permitting affidavits to be supplemented or opposed by depositions at a hearing on motion for summary judgment. It is clearly within the discretion of the court to deny such a request. See, e.g., United States v. Johns-Manville Corp., 259 F.Supp. 440, 455 (E.D. Penn. 1966); United States v. Johns-Manville Corp., 237 F.Supp. 893 (E.D.Penn. 1965). Discovery is ordinarily justified because of the likelihood that it will elicit evidence which might have a bearing on the outcome of the proceedings to which it is incident. But as the Court below noted, the discovery here requested by Appellants could not have had any conceivable bearing on the outcome of the Section 10(1) proceeding becsuse at most it could only have raised conflicts in the evidence and issues of credibility. And as we have seen, in Rule

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Rule 56(e) provides, in relevant part: "The court may permit affidavits to be supplemented or opposed by depositions. . . ."

10(1) proceedings the very existence of substantial questions of fact or issues of credibility ipso facto establishes reasonable cause. It is not uncommon for a court to limit discovery when it is convinced that it will serve no reasonable purpose, as when it appears that a plaintiff's case against a defendant whom he seeks to depose is wholly unfounded. See, e.g., Waldron v. British Petroleum Co., Ltd., 4 F.R.Serv.2d 30b.23, Case 1 (S.D.N.Y. 1961).

As we have seen in Part I of this brief, the district court has but a limited role in a Section 10(1) proceeding. As this Court has stated:

> "ordinarily a dispute as to a material question of fact precludes a judgment on the pleadings, but the dispute as to the question raised by the pleadings in the instant case was not within the province of the district court to resolve; it was one for the Board to decide. It seems apparent, and the district court so found, that the Board could find either that the certification covered by the three Goodrich employees at the Union Rock Plant or that it did not. That being the case, there existed reasonable cause raised by the pleadings that appellant was engaging in an unfair labor practice, thus justifying the issuance of the injunction."

(Local No. 83, Construction Drivers Union v. Jenkins, 308 F.2d 516, 517 (9th Cir. 1962).

All that the statutory yardstick of "reasonable cause" requires "is the prima facie establishment of facts from which an inference might be drawn that the charge is true. If this be so, injunction issues, whether the charges are ultimately proved true in the proceedings before the director or not." Kennedy v. Los Angeles Joint Executive Board of Hotel and Restaurant Employees, 192 F. Supp. 339, 341 (S.D.C 1. 1961). "The court may not resolve conflicting factual evidence in questions of credibility if the Board might reasonably resolve those issues in favor of the plaintiff." Fusco v. Richard W. Kasse Baking Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962). See also McLeod v. Local 478, Int'l. Union of Operating Engineers, 278 F. Supp. 22, 30 (D.Conn. 1967). In sum, all that is required is "credible evidence, establishing a prima facie case." Greene v. Bangor Bldg. Trades Council, 165 F.Supp. 902, (N.D.Me. 1958).

". . . The evidence need not establish a violation. It is sufficient to sustain the District Court's finding and conclusion if there be any evidence which might together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a

violation had occurred." (Madden v. International Hod Carriers, 277 F.2d 688, 692 (7th Cir. 1960).

That the discovery requested by Appellants would have been an exercise in futility is amply demonstrated by the court's decision in Jaffe v. Henry Heide, Inc., 115 F.Supp. 52 (S.D.N.Y. 1953). This was a Section 10(j) proceeding in which there were substantial conflicts in the evidence developed at the hearing. Nonetheless, the court held that the resolution of such conflicts was for the National Labor Relations Board, and not the court:

> "In this proceeding the court has power only to grant or deny intermediate relief pending the Board's final disposition of the complaints filed by the petitioner. Accordingly, the issue here is only whether on the evidence presented the Board could reasonably find that Heide committed unfair labor practices. There is the sharpest conflict in the testimony of Goddard and Heide as to the alleged agreement between the latter and the president of Local 452. There is also conflicting testimony as to whether Heide assigned organizers of Local 452 to supervisory positions for which they

were not qualified, in order to enable them to move freely from one department to another and thus facilitate their recruiting activities; and as to whether Heide deviated from its normal practice in requiring written confirmation of the check-off cards presented by Local 50 in July, 1952. These conflicts raise questions of credibility which the Board must resolve." (115 F.Supp. at 47).

The foregoing principle would be applicable to any of the forms of discovery that were requested by Appellants. In their request, Appellants did not specifically contend that on the basis of the petition and the affidavits before the Court there was not reasonable cause to believe that the Act had been violated. Nor did they contend that the Regional Director had acted arbitrarily or capriciously. The issue on which respondents sought discovery was characterized by them as the "limited area of the question of contralized control of the Hearst enterprise, and the inter-relationships among the various divisions of the Hearst Corporation." With respect to that issue, Appellants stated: "Affidavits of George R. Hearst, Jr., Charles L. Gould, Richard E. Berlin, Dan L. Starr and Harold E. Kelsey have been previously filed by petitioner. These affidavits, although they tend on their

face to indicate that the various divisions of the Hearst Corporation are separate and autonomous, nevertheless reveal the likelihood that much information tending to give the opposite may have been omitted from these affidavits." (Emphasis added).

Thus it is clear that even if Appellants had been allowed some form of discovery and even if they had succeeded in eliciting information or evidence which might tend to contradict the affidavits on file, it would have still been beyond the function of the Court below to resolve such conflict.

Nor do the authorities cited by Appellants support their argument that the Court below abused its discretion in denying their request for discovery. Those cases merely involved proceedings in which the courts deemed it proper, in the exercise of their discretion, to permit discovery. For example, in Madden v. Milk Wagon Drivers Union, Local 753, 229 F.Supp. 490 (N.D.Ill. 1964), the Regional Director had apparently not presented evidence by affidavits in support of his position, and accordingly, the court held that the respondents were entitled to discovery as a means of obtaining advance knowledge of the facts upon which the Regional Director would rely in support of the allegations of his petition for injunctive relief. As stated by the court,

". . . Unless discovery is permitted

in advance [of the hearing] . . ., the respondent will face the possibilities of surprise and inadequate preparation which the Federal Rules were designed to eliminate." (229 F.Supp. at 492).

The rationale underlying the court's discovery order in the foregoing case is clearly not applicable here. Here, the Regional Director had presented by way of twenty affidavits filed and served on respondents all of the evidence upon which he intended to rely at the hearing on his petition.

Appellants have also placed reliance upon Fusco v. Richard W. Kaase Baking Co., 205 F.Supp. 459 (N.D.Ohio 1962). This was a Section 10(j) proceeding in which the Regional Director had apparently not filed with his petition affidavits setting forth the evidence upon which he intended to rely at the hearing. Notices to take depositions were served on Mattson, an attorney for the Board's Eighth Region, and Fusco, Regional Director of the Eighth Region. Subpoenas were also served on the two Board agents. The Mattson subpoena called upon him to testify only, and the Fusco subpoena called upon him to testify and produce documents. It was agreed that Mattson and Fusco would be made available for depositions, but the Regional Director objected to the production of documents described in the subpoena. The only question before the

court concerned the limits of interrogation at the depositions and document production. The subpoena which was served on Fusco directed him to produce all statements taken in his preliminary investigation. The court ordered production of statements of employees who were to be witnesses at the hearing, but refused to order production of statements taken from persons who would not be witnesses at the hearing:

> "As to any statements of employees who are not to be witnesses, I find no good cause. Assuming that any such statements clearly showed a lack of 'reasonable cause' the net result would be a conflict in the evidence on that focal issue. As previously stated, the district court may not resolve any questions of credibility or evidentiary conflict. Hence, any such statements would not benefit respondent, even if they reflected facts squarely opposed to petitioner's theory." (205 F.Supp. at 464).

Thus the rationale underlying the court's discovery order in Fusco was the prevention of surprise. Here, however, Appellants had been served with affidavits containing all of the evidence upon which the Regional Director intended to rely. Thus, the precise holding in the Fusco case, if applied herein, would have left

respondents exactly where they began: With copies of the affidavits upon which the Regional Director relied.

In conclusion, since it is clear that the existence of a material question of fact establishes the statutory requirement of "reasonable cause", and in view of the fact that the Regional Director had served upon Appellants copies of twenty affidavits containing all of the evidence upon which he intended to rely, the lower Court's refusal to permit discovery of the nature requested by Appellants was plainly not an abuse of discretion.

IV. THE DISTRICT COURT'S ORDER THAT ALL EVIDENCE BE PRESENTED BY AFFIDAVITS AND THAT NO ORAL TESTIMONY BE HEARD UNLESS OTHERWISE ORDERED BY THE COURT WAS NOT AN ABUSE OF DISCRETION.

It well establishes in this Circuit that a preliminary injunction may be granted upon affidavits, and that the presentation of oral testimony is a matter wholly within the discretion of the district court. As this Court stated in Ross Whitney Corp. v. Smith, 207 F.2d 190 (9th Cir. 1953):

> "In our view, a preliminary injunction may be granted upon affidavits. A requirement of oral testimony would in effect require a full hearing on the merits and would thus

defeat one of the purposes of a preliminary injunction which is to give speedy relief from irreparable injury . . . .

"As for the requirement of notice and a hearing, affidavits meet the requirements of due process." (207 F.2d at 198).

The authorities to the contrary cited by Appellants, have heretofore been considered by this Court and rejected. Thus, in Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956), this Court recognized that a contrary view was held by some of the other courts of appeals, citing Sims v. Greene, 161 F.2d 87 (3d Cir. 1947), but reaffirmed its previous holding that "a preliminary injunction may, in the discretion of the trial court, be granted or denied, upon affidavits." (240 F.2d at 111).

Appellants, in effect, urge this Court to reverse its previous holdings that Rule 65 does not require an opportunity to present oral evidence, arguing that Rule 65's requirement of "notice" and a "hearing" implies a right to present oral testimony at a hearing on a motion for a preliminary injunction. In addition, Appellants argue that Section 10(1)'s provision for notice and "an opportunity to appear by counsel and present any relevant testimony" establishes a statutory right to present oral testimony at proceedings conducted pursuant to said section.

Directing our attention first to Appellants' Rule 65 argument, it is clear that the words "notice" and "hearing" contained in said Rule do not deprive a district court of discretion to deny a request for the presentation of oral testimony at a hearing on a preliminary injunction. Ross Whitney Corp. v. Smith, 207 F.2d 190, 198 (9th Cir. 1953) Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956). There is no such magic implication in the words "notice" and "hearing". Indeed, these terms are used in the Federal Rules in connection with proceedings which clearly do not contemplate the presentation of oral testimony. For instance, Rule 56, dealing with summary judgments, provides for ten days' notice on a motion for summary judgment and in subsections (c) and (d) refers to such proceedings as a "hearing". But Rule 56(c) provides that judgment shall be rendered on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . ." Notwithstanding the Rule's provision for "notice" and "hearing", there is no requirement of an opportunity to present oral testimony. And, Rule 43, dealing with the presentation of evidence generally, provides in subsection (e) that "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties [or] . . . may direct that the matter be heard wholly or partly on oral testimony or depositions."

The cases upon which Appellants rely in support of their Rule 65 argument state that where the evidence is conflicting the trial court should be afforded the opportunity of testing the credibility of witnesses by having the benefit of their cross-examination. These cases are premised on a reluctance to issue a preliminary injunction where there is a substantial conflict in the evidence, and they state that a preliminary injunction should issue only when the facts supporting preliminary relief are clearly established. See, e.g., Sims v. Greene, 161 F.2d 87, 88 (3d Cir. 1947); Industrial Electric Corp. v. Cline, 330 F.2d 489 (3d Cir. 1964); Warner Brothers Pictures v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940); General Electric Co. v. American Wholesale Co., 235 F.2d 606, 608 (7th Cir. 1956). There are two factors, however, which clearly make the holdings of these Rule 65 cases inapplicable here: first, in a Section 10(1) proceeding the court should not feel constrined by traditional bias against the issuance of a preliminary injunction when the evidence is conflicting; and second, in a Section 10(1) proceeding, the mere existence of substantial conflicts in the evidence is in and of itself sufficient to establish "reasonable cause" for the granting of injunctive relief.

As we have seen in Part I of this Brief, there can be no doubt but that the statutory standard of "reasonable cause" is satisfied if there is a showing of

a substantial factual issue which must be resolved by the Board. Accordingly, the rationale of the cases decided under Rule 65 is wholly inapplicable, in a Section 10(l) proceeding. Moreover, the policy against issuance of preliminary injunctions, which underlies the Rule 65 decisions, is not an appropriate consideration in a Section 10(l) proceeding. For Section 10(l) commands the courts to discard their traditional reluctance to issue preliminary injunctions when there is a substantial conflict in the evidence. As this Court has stated, Section 10(l) embodies a "Congressional policy favoring the granting of temporary injunctions." Local No. 83, Construction Drivers Union v. Jenkins, 308 F.2d 516, 517 n.1 (9th Cir. 1962).

Appellants' attempt to argue that Section 10(l) sets forth more stringent procedural criteria than Rule 65 wholly ignores the fact that Rule 65 was tailored to meet the requirements of private litigation, whereas Section 10(l) was intended to reflect standards of public interest and a policy favoring issuance of preliminary injunctions. To read into Section 10(l)'s reference to "testimony" a statutory requirement of "oral testimony" ignores the fact that whenever Congress has intended to make provision for the oral presentation of evidence, it has referred specifically to oral testimony and has not relied upon that meaning being implied from the word "testimony". For

example, Rule 43(e), relating to the presentation of evidence at hearings on motions, provides:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct the matter be heard wholly or partly on oral testimony or depositions."

Had Congress intended to impose a requirement that Section 10(l) proceedings be conducted on the basis of oral testimony, it surely would have made explicit provision therefor. For example, Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107) explicitly provides:

> "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of winesses in open court (with opportunity for cross-examination) . . . and testimony in opposition thereto. . . ."

At the time Congress enacted Section 10(l), the Senate had before it a proposal by Senator Ball which would have modified Section 10(l) by making applicable the requirements of Section 7 of the Norris-LaGuardia Act. (93 Cong. Rec. 4887, 5036, 5039). Senator Ball stated

that under his proposal:

> "Any union against which a charge is made, and against which relief is sought, will have greater protection, will be granted notice and full hearing in open court under our amendment, whereas under the provision now in the Committee Bill, which wipes out all of the safeguards of the Norris-LaGuardia Act and the Clayton Act, there is no such guarantee of notice and open hearing. I think we go a little further than the Committee Bill does." (93 Cong. Rec. 5037).

* * *

> "The provision [proposed by Senator Ball] . . . is identical with the provision now in the Norris-LaGuardia Act. It requires notice, public hearing, and cross-examination of witnesses in open court . . ." (93 Cong. Rec. 5039).

The Senate rejected Senator Ball's proposed amendment (93 Cong. Rec. 5058), adopting instead, that Section of the committee bill which was ultimately enacted as Section 10(l) and which does not require as a pre-requisite to the granting of injunctive relief that the court hear "testimony of witnesses in open court".

Thus, Section 10(1) can in no way be considered as embodying more stringent procedural requirements than are contained in Rule 65. If anything, the very opposite is true.

> "In a matter of this character [Section 10(1) proceeding] where the injunction is sought in aid of an administrative procedure provided by the Congress, the usual hesitance of courts to grant temporary injunctions [citation omitted] does not come into play. For here, as stated by the Supreme Court in a noted case, the
>
> > 'standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases.'
>
> Hecht Company v. Bowles, 1944, 321 U.S. 321, 313, 64 S.Ct. 587, 592, 88 L.Ed. 754." (Kennedy v. Los Angeles Joint Executive Board of Hotel and Restaurant Employees, 192 F.Supp. 339, 341 (S.D.Cal. 1961).

Ultimately, Appellants contend that discretionary denial of their request for the presentation of oral testimony was tantamount to making the Court below a mere rubber stamp for the Regional Director. But as we have seen, the Court below was required to issue the injunction

if the Regional Director's petition and the affidavits filed therewith demonstrated that there were substantial factual and legal issues for determination by the Board. Merely because the Court in this case could make that determination on the basis of the affidavits filed, rendering unnecessary the presentation of oral testimony, does not mean that the district court's function in a Section 10(l) proceedings is that of a rubber stamp. Its function is limited, but no more than is that of an appellate court which is bound to confine its scope of review to a determination of whether the trial court's findings were "clearly erroneous". Having a narrowly confined judicial function is not tantamount to being a rubber stamp.

In sum, it was not necessary for the Court below to hear oral testimony in order to determine whether reasonable cause existed for issuance of the preliminary injunction sought by the Regional Director. In these circumstances, it was clearly not an abuse of discretion for the Court to order that all evidence be presented by affidavits unless otherwise ordered by the Court*.

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* Although they did request that the Court compel the attendance of eight adverse witnesses, including five whose affidavits were filed by the District Director, Appellants did not request permission to have evidence presented orally by any of their witnesses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order and supplemental order of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, being first duly sworn, deposes and says that:

Affiant is a citizen of the United States and a resident of the county aforesaid; over the age of 18 years and not a party to the within entitled action; that Affiant's business address is 433 South Spring Street, Los Angeles, California.

On May 7, 1968, Affiant served the within BRIEF FOR CHARGING PARTIES - APPELLEES on the Appellants and all other parties in said action, by placing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

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SUBSCRIBED and SWORN to before me this 7th day of May, 1968.

Jean A. Badgley
Notary Public in and for said County and State

JEAN A. BADGLEY
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires November 4, 1968